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Supreme Court, U.S.
FILED

No. _____ 07-342 SEP 11 2007

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In The

Supreme Court of the United States

JAMES M. LUCKEY, et al.,

Petitioners,

vs.

PINELLAS COUNTY,
a political subdivision of the State of Florida, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Second District Court Of Appeal, State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a property owner have a constitutionally protected right to procedural due process before a change in land use regulation on adjoining property when state law requires notice and opportunity for hearing before a change in land use but the local governing body grants a change without affording notice and opportunity for hearing?

2) Does the failure of a state court to require notice or procedural due process with regard to entry of a development order to adjoining land owners while barring their due process complaint due to failure to timely appeal the order render state remedies illusory and inadequate?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties to the proceedings below were Innisbrook Condominium Association, Inc., the association established pursuant to Chapter 617, Florida Statutes, for managing all condominiums located within the Innisbrook Resort, with membership consisting of all owners of condominium units; James and Mary H. Luckey, owners of property in the subdivision known as the Highlands of Innisbrook, adjacent to the Innisbrook Resort, also owners of two condominium units in the Innisbrook Resort; Andrew McAdams, Aphrodite McAdams and Marc Banning, owners of property in the Highlands of Innisbrook subdivision, adjacent to the Innisbrook Resort; and, Joseph Colwell, Marcia Colwell, Kirk Covert and Deborah Covert who are owners of property in Autumn Woods, another nearby residential development directly across the street from Innisbrook Resort. Frank Wreath and Meredith P. Sauer, owners of condominium units at Innisbrook Resort, were also plaintiffs in the trial court, but did not join in the appeal and were, therefore, listed as appellees in the proceedings in the Florida District Court of Appeal.

Respondents are: Pinellas County, a political subdivision of the State of Florida; Golf Host Resorts, Inc., owner of the undeveloped property at the Innisbrook Resort; Bayfair Innisbrook F, LLC, contract vendee of Parcel F; and, GTA-IB, LLC, owner of Innisbrook Golf Club, and entitled to receive part of the proceeds of the sale of Parcel F.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, James M. Luckey, Mary Luckey, Marc Banning, Andrew McAdams, Aphrodite McAdams, Kirk Covert, Deborah Covert, Marcia Colwell, and Joseph Colwell, seek review of the February 28, 2007, judgment of the Second District Court of Appeal of Florida, affirming the March 8, 2006 Final Judgment of the Circuit Court for the Sixth Judicial Circuit in and for Pinellas County, Florida. Petitioners filed a Motion for Rehearing and Certification and Request for a Written Opinion which was denied on June 12, 2007.

OPINIONS BELOW

The opinion of the Second District Court of Appeal, State of Florida, is reported at ___ So. 2d ___, 2007 WL 1019273 (Fla. 2d DCA Case No. 2D06-1477 Feb. 28, 2007) and is reprinted in the Appendix to this Petition, p. 1. The March 8, 2006 Final Judgment of the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida, is unreported, but is reprinted in the Appendix, p. 3.

STATEMENT OF JURISDICTION

Petitioners seek review from the March 8, 2006, Judgment of the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida, affirmed by the Second District Court of Appeal, State of Florida. Review by the Supreme Court of Florida was not available because the Court of Appeal did not issue a written opinion and the case did not otherwise fall within the Supreme Court's discretionary jurisdiction. This Court has jurisdiction

pursuant to 28 U.S.C. § 1257(a). This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution requiring procedural due process prior to deprivation of a property interest is involved in this case, as is Chapter 163, Florida Statutes, relevant portions of which are set out in the Appendix, p. 38. Also involved is the Pinellas County Comprehensive Plan, relevant provisions of which are set out in the Appendix, p. 43-44.

STATEMENT OF THE CASE

This case addresses the right to due process under the Fourteenth Amendment of neighboring landowners with regard to issuance of a development order changing a land use designation on nearby or adjacent property.

The parcel at issue is undeveloped land in the Innisbrook Resort, a golf course resort community. Since the early 1980s, the development parcel, known as Parcel F, has continuously carried a land use designation of "Residential Estate" pursuant to the Comprehensive Plan, allowing development of one dwelling unit per acre. Other portions of the Innisbrook Resort have other designations allowing different density use, such as medium density residential or open space/recreation. A color copy of this part of the Pinellas County Comprehensive Plan Future Land Use Map (FLUM) is reprinted in the Appendix, p. 43-44.

Golf Host submitted a site plan application for Parcel F to the County on March 31, 2004. During consideration of the site plan application, questions arose among government officials as to whether the site plan could properly be approved without notice and hearing to neighboring landowners, however, the Final Site Plan was approved by the County Administrator on December 22, 2004, without notice or opportunity to be heard by affected members of the public and without any plan amendment, vested rights application, or recorded transfer of development rights. *See* Site Plan Approval reprinted in the Appendix, p. 45-46. In granting approval of the Final Site Plan, the County administrative staff did not follow the County's quasi-judicial procedures. The Final Site Plan provides for construction of 400 units, consisting of 21-single family homes, and 379 multi-family units within 57 buildings of up to 70 feet in height (Appendix, p. 45-46). The approval of the Final Site Plan is a "development order" as defined in §§ 163.3164 and 163.3215, Florida Statutes (2004).

A complaint related to anticipated site plan approval was filed by the Innisbrook Condo Association and Petitioner Banning in April 2004. This complaint was dismissed as premature because no development order had been issued. In November 2004, an amended complaint sought to challenge a series of other county actions which were seen as a prelude to approval of the site plan. In December 2004, these plaintiffs filed a second amended complaint which challenged the Final Site Plan approval as a development order. A separate action was filed by the Luckeys and McAdams, in which they sought an injunction and declaratory and supplemental relief as to the validity of the site plan approval based on transfer and averaging of densities and to declare the site plan approval unauthorized, void,

and of no legal force and effect. Subsequently, additional adjoining landowners intervened. These cases were consolidated and a combined Third Amended Complaint was filed, alleging that Pinellas County's approval of the Final Site Plan was in violation of Petitioners' procedural due process rights. Petitioners alleged the development order was issued without notice or opportunity for hearing to the public or to the Petitioners, who are neighboring land owners who qualify as aggrieved parties pursuant to section 163.3215(2), Florida Statutes (2004). Petitioners alleged they are directly affected by the proposed development to a degree greatly in excess of the general interest in the good of the community shared by all persons.

Pretrial rulings limited the scope of Plaintiffs' due process claims. On December 15, 2005, the trial judge issued an order finding that the County's approval of the Final Site Plan was "quasi-judicial action," and that Plaintiffs could not challenge the site plan approval on any grounds that could have been raised by petition for writ of certiorari challenging the development order. This pretrial order is reprinted in the Appendix, p. 28. The trial judge found that "the quasi-judicial actions of local governments are judicially reviewable only by writ of certiorari." Appendix, p. 32-36. Thus, the trial judge concluded that the Plaintiffs' claims related to procedural due process rights under the Florida Constitution should have been made by means of a certiorari petition within 30 days after the Final Site Plan approval and dismissed counts of the complaints related to procedural due process except those under 42 U.S.C. § 1983.

In the final judgment, the trial court denied all Petitioners objections to the development order. The claim for denial of procedural due process was denied because

Petitioners were held to have had an adequate state remedy in that they could have filed a petition for writ of certiorari challenging the development order; the fact that they received no notice of the order, opportunity for hearing, or notice of right to appeal was deemed irrelevant. Appendix, p. 20-22.

Petitioners appealed to the District Court of Appeal of the State of Florida, raising, *inter alia*, state and federal procedural due process grounds in that Petitioners were never given notice and an opportunity for hearing or notice of appellate rights. The appellate court affirmed without opinion. Under the Florida Constitution, no further review by the Supreme Court of Florida was possible.

REASONS FOR GRANTING THE WRIT

Under the federal constitution, due process requires that persons deprived of a right must be afforded notice and an opportunity to be heard. At a minimum, due process requires *some* kind of notice and *some* kind of hearing.

This Court has not established *per se* rules with regard to property interests that are subject to procedural due process protections. Rather, the determination of whether a party has a constitutionally protectable property interest is a matter of state law. Under Florida law, adjoining property owners have a right of notice and opportunity for hearing prior to change in use of neighboring property. If they appear in the proceedings as parties and preserve their objections for appeal, they have the right to appeal such decisions via petition for writ of

certiorari, which is used in lieu of appeal in Florida for quasi-judicial decisions.

In denying Petitioners' challenge in the present case, the court ignored their procedural due process right. Not only did they fail to receive notice of or opportunity for hearing concerning the development order, but the failure of notice also resulted in barring civil remedies due to failure to timely seek review of the order, and thus, rendered state remedies illusory and inadequate.

The court's ruling is reflective of confusion in procedural due process jurisprudence. If left unaddressed, it is a recipe for governments to ignore due process rights, bypass proper procedures, and engage in back room zoning politics without public recourse. Zoning and land use regulations serve in large part to protect neighboring property values by regulating land use by all landowners. As such, neighboring property owners have right to be free of arbitrary or irrational zoning actions. Standard state land use regulations across the nation and in Florida require notice to persons particularly affected by the change and provide that any person aggrieved by a land use decision may appeal the decision.

This case offers the Court the opportunity to establish due process rights of neighboring land owners in recognition of the fact that zoning and land use regulations are for their protection. Such a clarification would resolve the common quagmire of the extent of those rights. This case invites further definition of areas addressed by this Court in its recent procedural due process rulings.

This case presents the Court with the opportunity to speak to procedural due process rights in land use decisions that are relied upon by an entire community in deciding where to buy property and to make their homes.

I. A property owner has a constitutionally protected right to procedural due process before a change in land use regulation on adjoining property when state law mandates notice and opportunity for hearing before a change in land use.

Under the federal constitution, due process requires that persons deprived of a right must be afforded notice and an opportunity to be heard. *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 984, 108 L. Ed. 2d 100 (1990); *Goss v. Lopez,* 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L. Ed. 2d 725 (1975) (At a minimum, due process requires "*some* kind of notice and . . . *some* kind of hearing." (emphasis in original)). The determination of whether a party has a protectable property interest is a matter of state law.

In Florida, neighboring property owners are given the right to notice and hearing before a change in land use in Chapter 163, Florida Statutes. Florida's approach recognizes the general principle that zoning ordinances serve in large part to protect neighborhood property values by regulating land use by adjoining landowners. As such, neighboring property owners who challenge land use decisions are seeking to vindicate their own "right to be free of arbitrary or irrational zoning actions." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 263, 97 S.Ct. 555, 50 L. Ed. 2d 450 (1977). However, in the present case, Pinellas County's decision to approve the Parcel F site plan without notice effectively

changed the Parcel F zoning and land use designation without adhering to procedural due process required by Florida law. *See* Florida Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act). § 163.3161 *et seq.*, Fla. Stat. (2004). This Planning Act grants to each Florida county and municipality the power and responsibility to plan for future development and growth. § 163.3167(1)(a), Fla. Stat. (2004). To implement this responsibility each county and municipality must adopt a comprehensive plan of the type and in the manner set out in the Planning Act. § 163.3167(2), Fla. Stat. (2004). After adoption of a comprehensive plan, all land development regulations and development orders approved by a local government must be consistent with its comprehensive plan. § 163.3194, Fla. Stat. (2004).

Each local government comprehensive plan must contain a Future Land Use Element (FLUE). § 163.3177(6)(a), Fla. Stat. (2004). The FLUE must designate the distribution, location, and extent of uses of land within the local government's jurisdiction. *Id.* The FLUE must define each land use category in terms of allowable uses and must include standards to be followed in the control and distribution of population densities and building and structure intensities. *Id.* The FLUE must also include a Future Land Use Map (FLUM) of all lands within the local government's jurisdiction that depicts the proposed distribution, location, and extent of the various categories of land use. *Id.* To amend their adopted comprehensive plan or plan element a local government must adhere to strict statutory procedures that include review by state agencies and that provide affected persons with notice and various points of entry in which to be heard to comment on the amendment. § 163.3184, Fla. Stat. (2004).

In the instant case, the county's FLUM depicted Parcel F as having a future land use designation of "Residential Estate," defined in the County's FLUE as residential uses having a maximum density of one unit per acre. However, the Parcel F site plan approved by the County in December 2004 allowed development of 400 units on 39 acres. Thus, the population densities and building and structure intensities allowed by the Parcel F site plan are inconsistent with the parcel's published FLUM designation. The County attempted to reconcile this inconsistency by asserting that it properly applied certain planning tools sanctioned by its comprehensive plan. These planning tools include density averaging and the transfer of fictional development rights from parcels of golf course open space and conservation areas within Innisbrook.

However, Petitioners contended that the Countywide Plan requires all such transfers of development rights to be recorded to give public notice of potential land use density and intensity different from that depicted on the FLUM. There is no such recorded transfer of development rights for Innisbrook. Therefore, the Parcel F site plan is inconsistent with the Parcel F FLUM designation and no post-hoc transfer of fictional development rights can reconcile the inconsistency. Without following the statutory procedures or due process requirements, the county effectively changed the designated land use of Parcel F from the published category defined as having a maximum density of one unit per acre to an unpublished one allowing more than ten units per acre.

The County's decision to approve the Parcel F site plan violated the Petitioners' right to due process by effectuating a comprehensive plan land use designation change without adhering to statutory procedures. As such,

Petitioners met the requirements for showing a violation of procedural due process. Moreover, the trial court found the approval constituted quasi-judicial action, which further triggered the requirement to give notice to affected parties, yet the Petitioners were not afforded any opportunity to address the propriety of the County's asserted justification for the site plan approval.

To demonstrate a violation of procedural due process, the Petitioners must show: (1) that they have a liberty or property interest that the County interfered with; and (2) that the County failed to apply constitutionally sufficient procedures in interfering with that interest. *See, e.g., Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L. Ed. 2d 658 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 25 L. Ed. 2d 287 (1970).

The application of these principles was demonstrated in *First Assembly of God of Naples, Fla. Inc. v. Collier County*, 20 F. 3d 419, 422 (11th Cir. 1994). In *First Assembly*, the property owner complained that it was denied procedural due process in the enactment of zoning regulations that prevented it from operating a homeless shelter on its property. *Id.* at 421. The court declared that whether a person has a protected property interest is a matter of state law. *Id.* at 422. The court found that under Florida law, procedural due process attaches to zoning regulations that alter the manner in which land can be used by the landowner, thus *First Assembly* did have a protected property interest. *Id.* However, the court in *First Assembly* further declared that a violation of a state mandated procedure is not equivalent to a federal constitutional violation. *Id.* The court stated that under the federal

constitution due process requires that notice and an opportunity to be heard must be afforded to persons deprived of a protected right. *Id.* The court found that, although Collier County did not follow precisely the state laws requiring publication of hearing notice and annual codification of its ordinances, it did provide to *First Assembly* some notice and opportunity to be heard. *Id.* Therefore, the court held the alleged deficiencies did not rise to the level of a federal constitutional violation.

In the instant case, the Petitioners have a property interest recognized and protected under Florida law. For example, the Planning Act defines "Affected Persons" to include those who own real property abutting a parcel that is the subject of a proposed change to a future land use map. § 163.3184(1)(a), Fla. Stat. (2004). The Planning Act provides that affected persons have a right to notice and opportunity to be heard with respect to such comprehensive plan amendments. § 163.3184(7), (15), Fla. Stat. (2004). In addition, Florida courts have recognized that land owners have an interest in seeking to protect their own property values in the application of land use regulations to neighboring properties. *Exchange Investments, Inc. v. Alachua County*, 481 So. 2d 1223, 1225 (Fla. 1st DCA 1985); *Rectory Park, L.C. v. City of Delray Bea.*, 208 F. Supp. 2d 1320, 1326 (S.D. Fla. 2002). However, unlike Collier County in *First Assembly*, Pinellas County did not provide the Petitioners *any* notice or opportunity to be heard whatsoever. Therefore, the County's decision to approve the Parcel F site plan violated the Petitioners' right to due process by effectuating a comprehensive plan land use designation change without adhering to statutory procedures requiring notice and opportunity to be heard.

The trial court recognized the County's decision to approve the Parcel F site plan was a "quasi-judicial" decision. Florida law designates certain local government actions as "quasi-judicial" and others as "quasi-legislative." The Florida Supreme Court has set forth a functional test to determine whether a local government action was quasi-judicial or quasi-legislative. *Board of County Comm'rs. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). The court in *Snyder* stated: "It is the character of the hearing that determines whether or not county board action is legislative or quasi-judicial, for purposes of judicial review; generally speaking, legislative action results in formulation of a general rule of policy, whereas judicial action results in application of a general rule of policy." In the instant case, the trial court held the County's approval of the Parcel F site plan involved the application of policy and was thus a quasi-judicial act.

However, the court failed to recognize the ramifications of this correct categorization, which is that it required procedural due process. *Parklane Hosiery Co., Inc. v. Shore*, 429 U.S. 322, 99 S.Ct. 645, 58 L. Ed. 2d 552 (1979) ("It is violation of due process for a judgment to be binding on a litigant who was never a party or privy" or who lacked notice and opportunity to be heard.).

The trial court denied Petitioners' due process claims because of a classic "Catch 22" situation ("A paradox in which seeming alternatives actually cancel each other out, leaving no means of escape from a dilemma." American Heritage Dictionary, verba "Catch 22," p. 212 (New.Col.Ed.1979).) The jurisdiction of a Florida circuit court to review quasi-judicial decisions is invoked by filing a petition for writ of certiorari within thirty days of rendering of the court order. Florida Rule of Appellate Procedure 9.100(c) (2006).

Because some of the Petitioners sought judicial review by filing a complaint, as they were not given notice of quasi-judicial action or appellate remedies, and not by a petition for writ of certiorari, the trial court held they could not raise issues that could have been raised by petition for writ of certiorari. Other Petitioners did not know of the County's action in time to file a petition for writ of certiorari. Thus, although the County did not afford the Petitioners any notice or opportunity to be heard, allow them to become parties, or notify them of appellate rights, the court held Petitioners could not raise the issue of due process violation because they did not timely appeal the order. Thus, the Petitioners either had no remedy in state court for the County's violation of the Petitioners' due process rights, or the remedy asserted was illusory.

If the County's action was quasi-judicial, procedural due process was required. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). In *Jennings*, the court found that in order to afford due process in quasi-judicial proceedings, certain standards of basic fairness must be adhered to. *Id.* at 1340. The court declared that "a quasi-judicial decision based on the record is not conclusive if minimal standards of due process are denied." *Id.* (citing *Morgan v. United States*, 298 U.S. 468, 480-81 (1936)). The court found a quasi-judicial hearing must provide the parties with notice of the hearing and an opportunity to be heard, present evidence, cross-examine witnesses, and be informed of all the facts upon which the administrative body acts. *Jennings*, 589 So. 2d at 1340. Thus, the answer to the conundrum presented by this case should have been simple: since Petitioners were not given notice and opportunity to be heard and they were deprived of procedural due process then they could not be bound by

a decision to which they were neither party nor privy. *Cf. Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 332-333, 99 S.Ct. at 652 (denying relief where petitioners received a "full and fair" opportunity to litigate their claims). Petitioners' request for relief is consistent with this court's most recent jurisprudence in the area of procedural due process; although the court rejected the due process claim in each of these cases, the present case overcomes each hurdle that impeded the prior cases. In *American Manufacturers Mutual Insurance Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L. Ed. 2d 130 (1999), worker's compensation claimants alleged a deprivation of property without due process of law, in violation of the Fourteenth Amendment based on a private insurer's decision to withhold payment for disputed medical treatment pending review of its reasonableness and necessity, as authorized by state law. The court held that the insurer's action was not "fairly attributable to the State," and that respondents therefore failed to satisfy a critical element of their § 1983 claim. *Id.* at 58, 119 S.Ct. 977. The court also decided that because state law entitled them only to *reasonable and necessary* medical treatment, the claimants had no property interest in payment for medical treatment not yet deemed to meet those criteria. *Id.* at 61, 119 S.Ct. 977.

Next, in *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 149 L. Ed. 2d 391 (2001), the court dealt with the withholding of monies due a public works contractor. The court assumed the contractor had a protected property interest in the claim for payment under the contracts. But, because California law had afforded the contractor sufficient opportunity to pursue that claim in state court, the court concluded that the state had not

deprived the contractor of property without due process of law.

In its most recent discussion, *Castle Rock v. Gonzales,* 545 U.S. 748, 125 S.Ct. 2796, 162 L. Ed. 2d 658 (2005) the issue was whether a battered wife was denied procedural due process by police failure to enforce a restraining order against her husband. This court held that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause. . . ." *Id.* at 768. In part, the court's ruling was guided by the fact that the police response required use of discretion and stated, "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. 545 U.S. at 756, 125 S.Ct. at 2803.

The present case suffers none of the impediments presented in these three recent cases. The conduct complained of was state action, the decision to deny a hearing was not a matter of discretion, and the injured party was not given a meaningful chance to pursue the claim in state court.

II. The failure of a state court to require notice of entry of a development order to adjoining land owners while barring their due process claims based on failure to timely appeal the order renders state remedies illusory and inadequate.

By definition, a quasi-judicial decision under Florida law is one where the decision is contingent upon the evidence made at a hearing at which due process protections are provided. *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla.

1957). If there is no record of a hearing, certiorari is not appropriate as there would be nothing for a court to review, and the process lacks judicial characteristics. *Id.* "[C]ertiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi-judicial proceeding." *Id.* Put another way,

> It seems clear . . . that the test of a quasi-judicial function turns on whether or not the [agency] exercised a statutory power . . . to make a decision having a judicial character or attribute, and consequent upon some notice or hearing. . . . * * * [B]efore an administrative order may be considered quasi-judicial in character and therefore subject to review by certiorari, the statute authorizing the entry of such an order must also require that the administrative agency give due notice of a hearing . . . and provide a fair opportunity to be heard in a proceeding in which the party affected is accorded . . . due process of law.

Bloomfield v. Mayo, 119 So. 2d 417 (Fla. 1960) (emphasis added).

Florida courts have consistently held that where, as here, there is no requirement in a delegating ordinance or statute for the conduct of a quasi-judicial hearing, the proceedings are not quasi-judicial. *See, e.g., Walton v. Health Care Dist. of Palm Beach County*, 862 So. 2d 852 (Fla. 4th DCA 2003); *Bd. of County Comm'rs of Hillsborough County v. Casa Dev. Ltd.*, 332 So. 2d 651 (Fla. 2d DCA 1976). An action that lacks the incidents of a quasi-judicial hearing does not provide due process protections and does not create a record appropriate for review. Thus, such an action cannot be subject to certiorari review for the simple reason that the record is not appropriate for a

record-based review. *Pleasures II v. City of Sarasota*, 833 So. 2d 185 (Fla. 2d DCA 2002) (citing Robert Lincoln, *Executive Decision Making by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 Stetson L.Rev. 627, 635-39 (Spring 1996)). In fact, Florida's body of land use law and procedure has been built around this basic premise. The "record" in this proceeding consisted of a one-page Staff recommendation with a stamp on it. The County's action produced no record that could have been reviewed.

Absent notice and opportunity for hearing or other procedures consistent with a quasi-judicial process, Plaintiffs were entitled to sue for declaratory and injunctive relief. Only if given notice in a quasi-judicial proceeding must they exhaust administrative appeals (*i.e.*, certiorari review), which then constitutes res judicata and bars collateral attack.

Ultimately, Petitioners' core argument is simple: insofar as the County claims that the decision was quasi-judicial, it deprived the Appellants of due process by not providing the due process protections required in a quasi-judicial proceeding, in particular, notice to affected persons and opportunity to be heard. Effective review was not available in state court because the County did not provide notice and a due process hearing and only categorized the decision after-the-fact as quasi-judicial in order to thwart Petitioners' civil remedies. By claiming that the decision is quasi-judicial, but denying the Appellants the incidents of due process required of such a hearing, the County violated the most core principles of due process: notice and an opportunity to be heard, access to courts and the ability to petition for redress. To use that very denial to obstruct

judicial review and a due process remedy adds insult to constitutional injury.

CONCLUSION

Certiorari should be granted to review the judgment of the Second District Court of Appeal, State of Florida in *Innisbrook Condominium Assn. v. Pinellas County*, ___ So. 2d ___ (Fla. 2d DCA 2007).

Respectfully submitted,

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September 11, 2007

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

INNISBROOK CONDOMINIUM ASSOC., INC., JAMES M. LUCKEY, MARY H. LUCKEY, MARC BANNING, ANDREW J. McADAMS, APHRODITE B. McADAMS, KIRK E. COVERT, DEBORAH A. COVERT, MARCIA G. COLWELL, and JOSEPH E. COLWELL, Appellants, v. PINELLAS COUNTY; GOLF HOST RESORTS, INC., foreign corporations; BAYFAIR INNISBROOK F, LLC, a Florida limited liability corporation; GTA-IB, LLC, a Florida limited liability company; C. FRANK WREATH; and MEREDITH P. SAUER, Appellees.	Case No. 2D06-1477

Opinion filed February 28, 2007.

Appeal from the Circuit Court for Pinellas County; Crockett Farnell and Brandt C. Downey, III, Judges.

Pamela Jo Hatley, Tampa, and Susan W. Fox of Fox & Loquasto, P.A., Tampa, for Appellants.

Thomas G. Pelham, Tallahassee, William L. Hyde of Fowler White Boggs Banker P.A., Tallahassee, David Sadowsky, Assistant County Attorney, Clearwater, and Robert V. Williams of Williams Schifino Mangione & Steady P.A., Tampa, for Appellees Pinellas County, Golf Host Resorts, Inc., Bayfair Innisbrook F, LLC, and GTA-IB, LLC.

No appearance for Appellees C. Frank Wreath and Meredith P. Sauer.

PER CURIAM.

Affirmed.

DAVIS, SILBERMAN, and KELLY, JJ., Concur.

IN THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY FLORIDA
CIVIL DIVISION

INNISBROOK CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs,

vs.

PINELLAS COUNTY, a political subdivision of the State of Florida, GOLF HOST RESORTS, INC., a foreign corporation; BAYFAIR INNISBROOK F, LLC, a Florida limited liability corporation; and GTA-IB, LLC, a Florida limited liability company,

Defendants.
_____/

Case No.:
04-3388 CI-15
UCN:
522004CACO3388XXCICI

JAMES M. and MARY H. LUCKEY and ANDREW J. and APHRODITE B. McADAMS,

Plaintiffs,

vs.

PINELLAS COUNTY, a political subdivision of the State of Florida, GOLF HOST RESORTS, INC., a foreign corporation and BAYFAIR INNISBROOK, LLC, a Florida limited liability corporation,

Defendants.
_____/

Case No.:
05-2534 CI-20
UCN:
522005CA002543XXCICI

FINAL JUDGMENT FOR DEFENDANTS

These two consolidated cases came before the Court for trial on December 19, 20, 22, and 23, 2005. Counsel for the parties presented closing arguments to the Court on January 6, 2006.

Prior to trial, the Court had issued orders dismissing or granting summary judgments on several counts, or portions thereof, in both cases. Those Orders are as follows:

1. Order Granting Defendants' Motion to Dismiss Counts III, IV and V of Plaintiffs' Second Amended Complaint (Case No. 04-3388) entered on April 26, 2005.

2. Order on Various Motions (Case Nos. 04-3388 and 05-2534) entered on June 29, 2005.

3. Interim Order on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motions for Summary Judgment (Case Nos. 04-3388 and 05-2534) entered on September 26, 2005.

4. Order on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motions for Summary Judgment (Case Nos. 04-3388 and 05-2534) entered on December 15, 2005.

After the entry of these Orders, the following issues remained to be tried before the Court:

1. Plaintiffs' Innisbrook Condominium Association, Inc. ("Association"), Wreath, Sauer, and Bannings' claims pursuant to Section 163.3215, Florida Statutes, that the final site plan approved by the County is inconsistent with the Pinellas County Comprehensive Plan. (Case No. 04-3388, Counts I, II, III, IV and V).

2. Plaintiffs' claims that the Pinellas County Mandatory Rule on Transferable Development Rights Associated with FLUM Open Space Designations, Table 4, Part II. and Density Averaging, Table 4, Part III, of the Future Land Use Element of the County Comprehensive Plan and the transfer of density provisions in Section 138-645, Pinellas County Land Development Code, constitute unconstitutional delegations of legislative authority to administrative officials. (Case No. 04-3388. Count XIII; Case 05-2534, Count VI).

3. Plaintiffs' procedural due process claims pursuant to 42 USC §§ 1983 and 1988 (Case No. 04-3388, Count XV; Case No. 05-2534, Count VIII).

4. Plaintiffs Innisbrook Condominium Association, Inc., Frank Wreath, Meredith Sauer, and James M. and Mary H. Luckey's ("Luckeys") claim that certain oral and written representations constitutes a restrictive covenant on Innisbrook Parcel F which will be violated by construction of 400 residential units as permitted by the County's development order. (Case No. 04-3388, Count VI).

5. Plaintiffs Association, Wreath, Sauer, and Luckeys' claim that Defendants Golf Host and Bayfair Innisbrook are promissorily estopped from developing 400 residential units on Innisbrook Parcel F because of representations made to them by the Defendants. (Case No. 04-3388, County VII).

Based on the evidence presented at trial, the Court makes the following findings and conclusions.

THE PARTIES

Plaintiff Innisbrook Condominium Association, Inc. ("Association") is a Florida non-profit corporation consisting

of the owners of 938 condominium units within Innisbrook Resort. The Association itself does not own any condominium units in Innisbrook, and has no ownership interest in Parcel F or in any property adjacent to Parcel F.

Plaintiffs Sauer, in her capacity as trustee, and Wreath each reside in and also own two condominium units within Innisbrook. The Plaintiffs Luckeys also own two condominium units within Innisbrook but reside in The Highlands of Innisbrook, a subdivision located outside of the Innisbrook Resort. All of these Plaintiffs' condominium units within Innisbrook are located to the north of Parcel F, the closest being approximately 2,600 feet away.

Plaintiffs Banning, the Luckeys, and the McAdams all own single-family residences on individual lots within The Highlands at Innisbrook subdivision, which are separated from Parcel F by golf course fairways on Parcel F's western and northern borders. Plaintiffs Colwells and Coverts own single-family residences on individual lots in a subdivision known as Autumn Woods, which is located south of Parcel F. Autumn Woods is separated from Parcel F by an 80-feet public right-of-way for Bee Pond Road.

Defendant Golf Host Resorts, Inc. ("Golf Host") is the developer of the Innisbrook Resort and the owner of Parcel F. Defendant Bayfair Innisbrook, LLC, now known as Parcel F, LLC, has a contract to purchase Parcel F from Defendant Golf Host. Defendant GTA-IB, LLC, owns the Innisbrook Golf Club within the Innisbrook Resort, and by virtue of a contract with Golf Host, is entitled to receive a portion of the proceeds from the sale of Parcel F.

Defendant Pinellas County has jurisdiction over the Innisbrook Resort which is located within the unincorporated portion of the County.

THE INNISBROOK RESORT AND PARCEL F

These cases arise out of Pinellas County's approval of a final site plan for Parcel F in the Innisbrook Resort. Innisbrook is a golf course resort with four 18-hole golf courses, several restaurants, tennis courts, swimming pools and other amenities. Currently 1,766 multi-family residential units have been constructed in Innisbrook. The Innisbrook Resort currently contains approximately 846 acres, of which about 39 acres are located within the currently undeveloped Parcel F.

The development of Innisbrook Resort commenced after the County, in October, 1968, rezoned the initial 580 acres PRD (Planned Residential Development), the predecessor of the equivalent current RPD (Residential Planned Development District) zoning classification. Subsequently, in May, 1971, the County zoned an additional 200 acres PRD; in December, 1971, the County zoned another 76 acres RPD; and in June, 1987, the County zoned another 5.38 acres RPD.

Currently zoned RPD-5, Residential Planned Development, the Innisbrook Resort is a planned unit development. According to Section 138-641 of the Pinellas County Land Development Code (LDC), the RPD zoning district is intended "to encourage use of imaginative design, to avoid monotonous repetition of pattern, to provide adequate open space and to permit flexibility of site design." As in the case of Innisbrook Resort, the planned unit development concept typically produces a master plan containing a maximum number of residential units and an overall density for the entire project. Usually, the density is allocated within the development to different residential parcels containing a variety of different densities, with

some parcels having a higher density and some lower than the overall project density. *See, e.g., Palm Beach Polo, Inc. v. Village of Wellington,* 31 FLW 202d at p. 5 (Fla. 4th DCA 2005).

In accordance with Innisbrook's zoning, the existing multi-family residential units and supporting amenities have been clustered into discrete areas of the project in order to conserve open space and natural areas. The project's open space, including the four golf courses, natural areas, and natural and man-made waterbodies, constitute over 600 of the 846 acres within Innisbrook Resort. Only approximately 149 acres of the project are utilized for the existing 1,766 multi-family residential units. The residential parcels within the Resort have varying densities. With the development of 400 residential units on the 39-acre Parcel F. the overall density of the Innisbrook Resort will be 2.7 units per acre, which is substantially less than the 5 units per acre allowed by the RPD-5 zoning classification.

The most recent residential development in Innisbrook occurred on Parcels J and K pursuant to final site plans approved by the County. The final site plan for Parcel K, which contains 432 multi-family residential units on 34.6 acres, was approved in June, 1999. The final site plan for Parcel J, which contains 396 multi-family residential units on 31 acres, was approved on June 29, 2001. The final site plans for Parcels J and K were approved based on a revised overall development plan (master plan) for Innisbrook Resort. That master plan was approved by the County in 1998 (the 1998 revised master plan). Construction of the units on Parcels J and K was completed in the early 2000s.

On August 25, 2004, Golf Host submitted to Pinellas County a request to approve a proposed final site plan for Parcel F. On December 22, 2004, Pinellas County approved the final site plan for Parcel F. As approved by the County, the final site plan contains 400 multi-family residential units, including 19 single-family residences and 381 multi-family units. The multi-family units will be housed in 55 buildings, of which 49 will be a maximum of 35 feet in height, two will be a maximum of 55 feet in height, and four will be a maximum of 70 feet in height. The tallest buildings will be located in the lowest portion of Parcel F.

CLAIMS OF INCONSISTENCY WITH THE COUNTY COMPREHENSIVE PLAN

Plaintiffs Association, Wreath, Sauer, and Banning in Counts I-V (Case No. 04-3388) allege that the final site plan for Parcel F is inconsistent with the Pinellas County Comprehensive Plan. These claims are necessarily brought pursuant to Section 163.3215, Florida Statutes, which provides that affected persons may bring an action challenging the consistency of a development order with a local comprehensive plan. Specifically, these Plaintiffs allege that the approval of the final site plan allowing the construction of 400 units, including 19 single-family residences on small lots and four multi-family structures of 70 feet in height, are inconsistent with the Pinellas County Comprehensive Plan.

The issue of plan consistency is subject to the strict scrutiny standard of review which "arises from the necessity of strict compliance with the comprehensive plan." *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469, 475 (Fla. 1993). After strictly

scrutinizing and considering all of the evidence presented at trial, including the final site plan, the applicable provisions of the County Comprehensive Plan, and the testimony of County staff and the expert witnesses presented by the parties, the Court concludes that abundant substantial competent evidence has been presented to establish that the final site plan is consistent with the County Comprehensive Plan for the reasons discussed below.

Parcel F is designated Residential Estate on the Future Land Use Map (FLUM) of the County Comprehensive Plan.[1] Plaintiffs contend that the final site plan for Parcel F is inconsistent with the Comprehensive Plan FLUM designation of Parcel F as Residential Estate and the description of the Residential Estate future land use classification in Table 4, Part I, of the Future Land Use Element of the Comprehensive Plan.

However, in determining the consistency of the final site plan, the Court must consider the consistency of the Comprehensive Plan as a whole and not just the FLUM and Table 4, Part I. *Board of County Commissioners of Sarasota County v. Karp,* 662 So. 2d 718, 720 (Fla. 2d DCA 1995); *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach,* 788 So. 2d 204, 209 (Fla. 2001). Thus,

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[1] Prior to the County's adoption of its new Comprehensive Plan in 1989, Parcel F was designated Residential Conservation which like the current Residential Estate classification provided for a general density standard of one unit per acre. The then existing approved 1988 Master Plan for Innisbrook Resort allowed 485 multi-family units on a portion of Parcel F. The new 1989 Comprehensive Plan retained the Residential Conservation designation for Parcel F. When the County in 1990 adopted revised zoning regulations to be consistent with the 1989 Comprehensive Plan, the County retained the RPD-5 zoning for Innisbrook Resort, including Parcel F.

in this case, the County Comprehensive Plan as a whole, including the FLUM and other provisions of the Comprehensive Plan, must be considered in determining consistency. Also, as explained below, all of Table 4, and not just Part I, must be considered.

The textual provisions of the Pinellas County Comprehensive Plan which relate directly to the permitted uses and densities on Parcel F are found in Table 4 of the County Comprehensive Plan. Part I of Table 4 gives a general description of the Residential Estate future land use classification, including the general density standard of one unit per acre. The provisions in Table 4, Part I apply to a stand-alone parcel of land that is designated Residential Estate. However, if a parcel is part of a larger planned development, such as Parcel F in the Innisbrook Resort, then the provisions of Table 4, Parts II and III, must also be considered in determining permitted density on each parcel within the overall project.

Table 4, Part II, Mandatory Rule on Transferable Development Rights Associated with FLUM Open Space Designations, provides that residential densities may be transferred from specified FLUM Open Space designations into any residential FLUM category, which would include the Residential Estate classification. However, Part II also provides that transfer of residential units from some FLUM open space designations is permissible only when the entire area is considered as one project and that the total development intensity shall not exceed what is normally allowed under the comprehensive plan for the total area in question. In such projects density averaging within residential FLUM categories is allowed in accordance with Table 4, Part III. Pursuant to this provision, after residential units have been transferred into

residential categories on the FLUM, the residential densities may be reallocated within those residential categories. The Innisbrook Resort has been planned and developed as a single master planned project and is considered by Pinellas County to be one project.

Under the County's RPD zoning regulations, a developer must first obtain approval of an overall development plan (master plan) for an RPD project. In order to undertake development, a final site plan, which is consistent with the approved master plan, must be approved by the County. In 1998, the County approved a revised overall development plan for Innisbrook which transferred densities from the FLUM open space and preservation classifications in the Innisbrook Resort into Parcels J, K, and F, all of which have residential land use classifications. In 2001, the County approved a revised master plan which averaged or reallocated unused densities in Parcels J and K to Parcel F pursuant to Table 4, Part III. Defendant Golf Host then sought and obtained approval from the County for the final site plan for Parcel F in 2004.

The Defendants submitted an abundance of substantial competent evidence to establish that the County strictly complied with the provisions of Table 4, Parts II and III, in transferring densities to Parcel F under the 1998 revised master plan and then approving the final site plan for Parcel F. Moreover, the undisputed evidence presented at trial is that County staff applied Table 4 to Innisbrook Resort, including Parcel F, in the same manner that staff has applied Table 4 to the numerous other RPD master planned developments in Pinellas County.

The County staff first determined the total number of residential units allowed under the Comprehensive Plan

future land use classification for the entire Innisbrook Resort. In making this calculation, the County staff included 39 units for Parcel F in accordance with its Residential Estate classification on the FLUM. Next, in accordance with Table 4, Part II, staff determined the total number of residential units that could be transferred from FLUM open space classifications to FLUM residential classifications within Innisbrook Resort. Then it calculated the number of units that had already been developed in Innisbrook, including Parcels J and K, and determined that 539 units were still available for development within Innisbrook.[2] The final site plan for Parcel F then approved 400 of those units for development on Parcel F.

Table 4, Part II, requires that the land use density and pattern resulting from a transfer of densities be compatible with existing and planned uses. Table 4, Part III, provides that when density averaging is utilized, the distribution of residential units within a development project must be compatible with the natural environment, support facilities, and land uses in adjacent and surrounding areas. Regarding the Comprehensive Plan's compatibility requirements, compatibility is defined as "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." The Court finds that abundant substantial competent evidence presented at trial demonstrates that the

[2] The County staff's calculations did not attribute any residential units to manmade water bodies within Innisbrook Resort even though County staff acknowledges that Table 4, Part II, would allow residential units to be transferred from these areas.

final site plan is consistent with these compatibility requirements, as the County staff correctly determined.

Sections 138-641 – 138-645 of the Pinellas Land Development Code establish standards for ensuring compatibility in an RPD planned development. It provides that distance, setbacks, and buffers shall be utilized to achieve compatibility, and contains detailed distance, setback, and height standards. Substantial competent evidence presented at trial establishes that the configuration and distribution of the 400 units on Parcel F meet or exceed these standards, as well as all other requirements, including the height restrictions, of the RPD-5 zoning district regulations. Regarding the net density of 10 units per acre on Parcel F under the approved final site plan, the Court finds that this density is less than the net densities of several other existing residential development pods in Innisbrook which go as high as 16 units per acre.

The Court finds the testimony of Defendants' expert Cynthia Tarapani, a certified planner, to be persuasive and credible. Tarapani conducted a detailed investigation of the regulatory history of Innisbrook Resort, reviewed the County staff's analysis of permitted densities in Innisbrook Resort and Parcel F, and conducted her own independent analysis of permitted densities. She also evaluated the approved final site plan, performed her own compatibility analysis of the final site plan which included site inspections of Innisbrook Resort and adjacent and surrounding areas, and analyzed the final site plan's consistency with the County Comprehensive Plan.

Based on her analyses, Tarapani testified that the final site plan is consistent with the County Comprehensive Plan, including both the applicable density and

compatibility provisions. Regarding density, Tarapani determined that the County staff's calculations were conservative, and that there were actually 155 more residential units available for development in the Innisbrook Resort than indicated by the County staff calculations. In determining that the final site plan for Parcel F satisfies the compatibility requirements of the County Comprehensive Plan, she considered numerous factors, including the fact that Parcel F is surrounded by golf course fairways on three sides and an 80-feet public right-of-way on another side, the significant distances between structures on Parcel F and those in surrounding areas, and the placement of structures on Parcel F. Based on her analyses, Tarapani concluded that the development of Parcel F in accordance with the approved final site plan will not negatively impact existing land uses in adjacent and surrounding areas. She also concluded that the final site plan for Parcel F is consistent with and will not alter the character of the overall development plan for the Innisbrook Resort.

The very generalized, speculative, and factually unsupported complaints expressed by the individual Plaintiffs concerning alleged impacts on the internal road system, amenities, and natural resources of Innisbrook Resort, surrounding areas, and their property values do not overcome the detailed testimony presented by the Defendants about the compatibility of the proposed development of Parcel F under the final site plan. Some of the Plaintiffs testified that they were not even familiar with the proposed location and distribution of units on Parcel F or with the distances from their homes to the closest proposed structure on Parcel F.

Considering all of the evidence presented about Innisbrook, including Parcel F, and the surrounding areas, including the Autumn Woods and Highlands subdivisions, and the requirements of the Comprehensive Plan as a whole, including the entirety of Table 4, the Court concludes that County staff acted within the scope of its authority in approving the final site plan. Further, the Court concludes that the final site plan is not incompatible with the overall area and is not inconsistent with the Comprehensive Plan.

Plaintiffs argue that Parcel F cannot be developed for more than 39 single-family estate houses because it is designated on the FLUM as Residential Estate which is generally limited to one unit per acre. The Court rejects this argument because it not only ignores the fact that Parcel F is part of the Innisbrook Resort planned development but also the plain language of Table 4, Parts II and III. As noted above, Table 4, Part II, allows transfer of residential densities into any FLUM residential category, and Table 4, Part III, allows density averaging within FLUM residential use categories that are located in one project. Further, acceptance of Plaintiffs' argument would prevent transfer of densities into any residential future land use category because Table 4, Part I specifies a general density standard for each such category. Consequently, Plaintiffs' argument would render Table 4, Parts II and III meaningless and preclude planned developments which are encouraged by Objective 1.6 of the Future Land Use Element of the County Comprehensive Plan.

Plaintiffs also contend that under Table 4, Part I, the RPD-5 zoning classification which applies to Innisbrook and Parcel F is not listed as being compatible with the Residential Estate future land classification. However, the

introduction to Table 4 expressly provides that the County Local Planning Agency (the Pinellas County Department of Planning), may find that other zoning classifications are compatible with the Residential Estate classification for a specific parcel of land in a particular situation. The undisputed testimony at trial is that the Local Planning Agency found that RPD-5 zoning for Parcel F is compatible with the Residential Estate classification in this particular situation, which involves the development of Innisbrook Resort as a master planned development and the approval of the Parcel F final site plan in accordance with the requirements of Table 4, Parts II and III.

Plaintiffs contended at trial that the final site plan approval is also inconsistent with other provisions of the Pinellas County Comprehensive Plan. Based on a careful reading of those provisions and the testimony and other evidence presented at trial, the Court concludes that the final site plan is not inconsistent with any of those provisions.

Specifically, with regard to Objective 3.7 and Policy 3.7.1 of the Future Land Use Element of the Comprehensive Plan, Plaintiffs contend that the TDR provisions in Table 4 are inconsistent with the Countywide Plan adopted pursuant to the Special Act, Chapter 73-594, Laws of Florida, as amended, and that therefore, the final site plan is not consistent with the transfer of development rights (TDR) provisions in the Countywide Plan. The Court has previously ruled that Plaintiffs do not have standing to enforce the Countywide Plan. (See above referenced Orders entered on April 26, 2005, and September 26, 2005.) Also, Plaintiffs' complaints do not allege that the County Comprehensive Plan is inconsistent with the Countywide Plan. Nevertheless, while it was not admitted

into evidence, Plaintiffs proffered testimony regarding this issue at trial, including testimony that the TDR provision in the County plan is inconsistent with a TDR provision in the Countywide Plan which was first adopted in 2000. The undisputed evidence presented at trial established that the County Comprehensive Plan has been officially determined to be consistent with the Countywide Plan and that there has been no official determination to the contrary. Moreover, specifically with regard to the claim that the TDR provisions of the Countywide Plan were changed in 2000, as discussed above, the transfer of density to Parcels J, K, and F occurred with the approval of the revised overall development plan for Innisbrook in 1998 prior to the alleged changes in the Countywide Plan in 2000.

Based on the foregoing, Plaintiffs are not entitled to any relief on their claims that the final site plan is inconsistent with the County's Comprehensive Plan.

THE UNLAWFUL DELEGATION CLAIM

Plaintiffs' claim that the mandatory rule of transferable development rights provisions in Table 4, Parts II and III, and LDC Section 138-645 constitute unconstitutional delegations of legislative authority to administrative officials. The essence of Plaintiffs' complaint is that the transfer and averaging of densities to Parcel F can only lawfully be accomplished by actions of the Pinellas County Board of County Commissioners and not by the County administrator who has been delegated the authority to approve RPD final site plans. The Board of County Commissioners not only adopted Table 4 and the future land use map in the County's Comprehensive Plan and Section 138-645 of the Pinellas County Land Development Code,

but also the RPD zoning which applies to all of Innisbrook, including Parcel F. Thus, the Board, and not the administrative staff, established the types and maximum densities and intensities of uses that may be developed in the Innisbrook Resort as a whole. Table 4 and LDC Section 138-645(3) of the LDC only allow administrative staff to approve transfers of densities within the Innisbrook Resort in accordance with the standards set forth in Table 4 and LDC Section 138-645. The Court concludes that these provisions do not constitute unconstitutional delegations of legislative authority to administrative officials for the following reasons.

Under the nondelegation doctrine, the legislature must enact law and make primary policy decisions, but it may delegate the power to administer the law to administrative officials if the legislative enactment contains adequate standards to guide the officials in the administration of the law. *State v. Atlantic Coast Line Railroad Co.,* 47 So. 969, 976 (Fla. 1908); *Avatar Development Corporation v. State of Florida,* 723 So. 2d 199, 201-202 (Fla. 1998).

The Pinellas County Board of County Commissioners made the primary policy decisions regarding the establishment, transfer, and averaging of densities when it adopted Table 4 and LDC Section 138-645. The Court has considered the standards contained within Table 4, Parts II and III and LDC Section 138-645. These provisions contain adequate standards to guide the decisions of administrative staff pertaining to the determination, transfer and averaging of densities. Among other things, these standards specify the maximum permitted density within a project and the maximum density that may be transferred from various future land use categories, along

with the further limitation that residential densities can only be transferred onto land that has been designated for residential use on the future land use map adopted by the Board of County Commissioners.

Also, the standards specify that the resulting development pattern must meet compatibility standards, as discussed in the preceding section. Regarding the determination of compatibility, LDC Chapter 138, Article IV, Division 11, which was also adopted by the Board of County Commissioners and which includes Section 138-645, contains detailed standards for determining and insuring compatibility. The Court concludes that these standards are sufficient to guide the administrative exercise of the delegated authority, and therefore Table 4, Parts II and III, and Section 138-645, are not unconstitutional delegations of legislative authority.

Therefore, Plaintiffs are not entitled to any relief on this claim.

PROCEDURAL DUE PROCESS CLAIM

In Count XV (Case No. 04-3388) and Count VIII (Case No. 05-2534), Plaintiffs' claim that the County's actions to transfer and to redistribute density, culminating in approval of the final site plan for Parcel F, without giving them notice and a hearing, violated their rights of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution. For the reasons discussed below, Plaintiffs' procedural due process claim under 42 U.S.C. § 1983 must be denied.

Preliminarily, the Court finds that although the County gives notice and hearing for the rezoning of property,

neither the County's regulations nor Florida Statutes required the County to give Plaintiffs notice and a hearing prior to approval of changes to the master plan, of density transfers, of density averaging, or of the final site plan. Also, as earlier discussed, none of the Plaintiffs have an ownership interest in Parcel F.

Plaintiffs have the burden of proof on every element of their Section 1983 claim. No violation of federal procedural due process occurs until government fails to provide due process. *Ziverman v. Vurch,* 494 U.S. 113, 123 (1990). Thus, assuming that they were entitled to receive notice and a hearing under the U.S. Constitution, Plaintiffs were required to allege and prove that they did not have an adequate state remedy. *McKinney v. Pate,* 20 F.3d 1550, 1557, 1563-65 (11th Cir. 1994)

Plaintiffs have not alleged nor did they prove that they did not have an adequate post-deprivation remedy. As this Court has previously ruled, the County's approval of the final site plan for Parcel F was a quasi-judicial action. (See Order on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment entered on December 15, 2005.) Thus, except for the issue of the final site plan's consistency with the County comprehensive plan, the County's approval of the site plan was judicially reviewable only by certiorari. *See, e.g., Educ. Development Ctr. v. Palm Beach County,* 721 So. 2d 1240, 1241 (Fla. 4th DCA 1998); *City of St. Petersburg v. Cardinal Industries Dev. Corp.,* 493 So. 2d 535, 537 (Fla. 2nd DCA 1986). Section 163.3215, Florida Statutes, provides a state remedy to challenge the plan consistency of the final site plan, and Plaintiffs are pursuing that state remedy in this de novo action.

Regarding their procedural due process claims, Plaintiffs could have but failed to file a petition for writ of certiorari within 30 days after approval of the final site plan on December 22, 2004. Fla. R. App. P. 9.100(c)(2). In such a certiorari proceeding, Plaintiffs could have raised and the Court could have considered whether the County violated Plaintiffs' procedural due process rights. *See, e.g., Manatee County v. City of Bradenton,* 828 So. 2d 1083 (Fla. 2nd DCA 2002). Since the Plaintiffs did not timely pursue this appropriate and available certiorari remedy under state law (see Order entered on December 15, 2005), their procedural due process claim pursuant to 42 U.S.C. § 1983 must fail. *See McKinney v. Pate,* 20 F.3d 1550 (11th Cir.) (en banc), cert. denied 513 U.S. 1110 (1994); *Gainer v. City of Winter Haven,* 170 F. Supp. 2d 1225, 1233-34 (M.D. Fla. 2001).

RESTRICTIVE COVENANTS CLAIM

In Count VI (Case No. 04-3388), Plaintiffs Association, Wreath, Sauer, and the Luckeys essentially seek a declaration that the proposed development of 400 residential units on Parcel F violates alleged restrictive covenants limiting the maximum number of units in the entire Innisbrook Resort to 1,200. The alleged restrictive covenants include Declarations of Condominium Numbers 1, 11, and 26 which govern the condominium units owned by these Plaintiffs but not Parcel F, statements in Prospectuses and Offering Statements, and oral representations made by Defendant Golf Host.

The Court finds that the number of residential units in Innisbrook Resort exceeded 1,200 prior to the approval of the final site plan for Parcel F. As previously discussed,

the final site plan approved for Parcel K (432 units) in 1999 and for Parcel J (396 units) in 2001 each exceeded the alleged 1,200 unit, and together brought the total number of approved units in Innisbrook Resort to 1,766 units. Plaintiffs did not object to or challenge the approval or construction of these units.

Regarding the alleged restrictive covenants, it is well-established law in Florida that a restrictive covenant must be in writing. *See Smith v. Homeseeker's Realty Co.*, 97 Fla. 237, 122 So. 708 (1929); § 712.01(6), Fla. Stat. (definition of term "covenant or restriction" in Marketable Record Title Act.) Accordingly, the alleged oral representations made by Golf Host do not constitute restrictive covenants that are binding on Parcel F.

Plaintiffs did not present any written document that can be construed as a restrictive covenant prohibiting the development of more than 1,200 units in the entire Innisbrook Resort. As for the enumerated Declarations of Condominium, each and every one, in section 3 (entitled: "Development Plan"), state only that the number of condominium units in the Innisbrook Condominium Association, Inc. will be limited. In none of the three Declarations of Condominium is there any mention of any limitation on the number of units in the entire Innisbrook Resort or on the number of units that are not within the Association. Thus, at most, there is a limitation as to the number of units within the Innisbrook Condominium Association which would not preclude development of 400 units on Parcel F if they are not in the Association. None of the units developed on Parcel F will be in the Association.

Further, in each of the three Declarations, in Section 3 (entitled "Development Plan"), the developer expressly and

unambiguously "reserves the right to revise and amend the Development Plan." Thus, the Declarations do not constitute restrictive covenants which limit the number of units in Innisbrook Resort to 1,200 or prohibit the development of 400 units on Parcel F.

As for the various Prospectuses and Offering Statements submitted by these Plaintiffs, each and every one expressly and unequivocally reserves the developer's right to amend and modify the plan of development, including the number of units. Accordingly, these documents do not constitute restrictive covenants restricting the number of units that could be developed within Innisbrook Resort or Parcel F.

Based on these findings and conclusions, Plaintiffs' claim for relief in Count VI (Case No. 04-3388 is therefore denied.

PROMISSORY ESTOPPEL CLAIM

In Count VII (Case No. 04-3388) Plaintiffs Association, Wreath, Sauer, and Luckeys contend that as inducements to Plaintiffs to purchase condominium units in Innisbrook, the Defendant Golf Host represented to the purchasers that no more than 1,200 units would be developed in the entire Innisbrook Resort. As a result, Plaintiffs claim that Defendants are promissorily estopped from constructing any units on Parcel F.

Promissory estoppel can be applied to enforce oral promises not covered by the statute of frauds if the promise is definite, of a substantial nature, and is established by clear and convincing evidence. *W. R. Grace v. Geodata Services, Inc.*, 547 So. 2d 919, 924 (Fla. 1989). Also, the reasonableness of the promissee's reliance must be considered. *Id.* Plaintiffs are not entitled to any relief on the

basis of promissory estoppel regarding any oral representation that no more than 1,200 units would ever be built in Innisbrook Resort. Obviously, any such promises constitute actions which could not have been performed within one year and are thus covered by the Statute of Frauds, § 725.01, Fla. Stat. *See Sanz v. R.R. Aerospace Corp.*, 650 So. 2d 1057 (Fla. 3d DCA 1995).

Moreover, Plaintiffs have failed to present clear and convincing evidence to support their claim of promissory estoppel. None of the Plaintiffs, except Sauer, purchased the units they own from Defendant Golf Host. Sauer purchased only one of her units from Golf Host, in 1972, and she testified that she could not recall exactly when or what she was told about the number of units in Innisbrook. Only Wreath testified that he would not have purchased his unit "but for" the alleged representation, but he purchased one of his units after the construction of the units on Parcels J and K. The Luckeys testified that they could not recall whether any such representation was ever made to them. Also, the Luckeys purchased their units in Innisbrook Resort after the construction of the units in Parcels J and K which exceeded the alleged 1,200-unit limit.

Further, as discussed in the preceding part, the alleged representations were contradicted by the express and unambiguous terms of the written Declarations of Condominium, the Prospectuses, and the Offering Statements, all of which expressly reserve the right to increase the number of units within Innisbrook. Each of the individual Plaintiffs testified that they received and read these documents when they purchased their units. Also, it is well-established Florida law that preliminary agreements and understandings concerning the sale of realty merge into the deed, *see St. Clair v. City Bank and Trust Co. of*

St. Petersburg, 175 So. 2d 791 (Fla. 2d DCA 1965), and Plaintiffs' own witness, the real estate broker Richard Lehman, admitted that such a merger clause was expressly included in the purchase agreements of the Plaintiffs. Accordingly, not only have the individual Plaintiffs not established by clear and convincing evidence that Golf Host made a definite promise not to ever build more than 1,200 units in the Innisbrook Resort, but any reliance on such a promise would clearly have been unreasonable.

The Association's claim in this regard is wholly without merit. No promises were made to it, no purchases of units were made by it, no units are owned by it, and thus no reliance on any alleged inducement can be claimed.

Therefore, Plaintiffs' claim for relief on Count VII (Case No. 04-3388) is denied.

The Court, having denied each of Plaintiffs' claims, hereby enters Final Judgment for Defendants on each of the claims. The Court retains jurisdiction for the purpose of awarding costs and attorneys' fees, if applicable.

DONE and ORDERED this _ day of _____, 2006, in Clearwater, Florida.

ORIGINAL SIGNED
MAR 08 2006
BRANDT C. DOWNEY III
CIRCUIT JUDGE

Brandt C. Downey, III
Circuit Judge

Copies furnished to:

Stephen O. Cole, Esq.
David Smolker, Esq.
David Sadowsky, Esq.
Robert V. Williams, Esq.
Thomas G. Pelham, Esq.

IN THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY FLORIDA
CIVIL DIVISION

INNISBROOK CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs,

vs.

PINELLAS COUNTY, a political subdivision of the State of Florida, GOLF HOST RESORTS, INC., a foreign corporation; BAYFAIR INNISBROOK F, LLC, a Florida limited liability corporation; and GTA-IB, LLC, a Florida limited liability company,

Defendants. /

Case No.:
04-3388 CI-15
UCN:
522004CACO3388XXCICI

JAMES M. and MARY H. LUCKEY and ANDREW J. and APHRODITE B. McADAMS,

Plaintiffs,

vs.

PINELLAS COUNTY, a political subdivision of the State of Florida, GOLF HOST RESORTS, INC., a foreign corporation and BAYFAIR INNISBROOK, LLC, a Florida limited liability corporation,

Defendants. /

Case No.:
05-2534 CI-20
UCN:
522005CA002543XXCICI

ORDER ON DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTIONS FOR SUMMARY JUDGMENT

THESE CONSOLIDATED CASES came before the Court on November 3, 2005, on the following motions:

1. Defendants' Motion to Dismiss Counts I-V (As To Intervening Plaintiffs Only) And VIII-XV In Case No. 04-3388-CI-15, and Counts I-VIII in Case No. 05-2534-CI-20 For Lack of Subject Matter Jurisdiction With One Exception.

2. Defendants Golf Host Resorts, LLC and Innisbrook F, LLC's Motion for Final Summary Judgment on Counts I-VII and Partial Summary Judgment on Count VIII of the Second Amended Complaint, and Defendants' First, Second, Fourth and Fifth Affirmative Defenses in Case No. 05-2534 CI-20 (the "Luckey complaint").

3. Defendants Golf Hosts Resorts, LLC and Innisbrook F, LLC's Motion for Final Summary Judgment as to all Plaintiffs on Counts III-V and VIII-XIV and Partial Summary Judgment on Count XV of the Third Amended Complaint, and Final Summary Judgment as to Intervening Plaintiffs on Counts I-V of the Third Amended Complaint, and Defendants' Third, Fourth, Fifth, Twelfth, Thirteenth, Fifteenth, and Twentieth Affirmative Defenses in Case No. 04-3388 CI-15 the "Innisbrook complaint").

Prior to the November 3, 2005 hearing, Defendant GTA-IB, LLC's Joinder in Motion to Dismiss Counts I-V (As To Intervening Plaintiffs Only) And VIII-XV In Case No. 04-388-CI-15 And Counts I-VIII In Case No. 05-25340-CI-20 For Lack of Subject Matter Jurisdiction With One

Exception, and Defendant Pinellas County's Joinder In Motion to Dismiss Counts I-V (As To Intervening Plaintiffs Only) And VIII-XV In Case No. 04-3388-CI-15 And Counts I-VIII In Case No. 05-25340-CI-20 For Lack of Subject Matter Jurisdiction With One Exception were filed on August 23, 2005.

A hearing on some of the issues raised in these Motions was held on August 30, 2005. Subsequently, the Court entered its Interim Order on Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motions for Summary Judgment on September 26, 2005. The issue of the Court's certiorari jurisdiction raised by the Defendants in the above-referenced motions was not argued or considered at the August 30, 2005 hearing and was not ruled on by the Court in the September 26, 2005 Interim Order. The issue of certiorari jurisdiction was heard on November 3, 2005.

The purpose of this order is to set forth the Court's rulings on the certiorari jurisdictional issues raised in the above-referenced Motions.

Counts III-V and VIII-XV of the Innisbrook Amended Complaint (Case No. 04-3388 CI-15) and Counts I-VIII of the Luckey First Amended Complaint (Case No. 05-2534 CI-20) all challenge the validity of the final site plan approved by Pinellas County for Innisbrook Parcel F and request the Court to invalidate the final site plan approval. Among other things, the Plaintiffs in both cases claim that the final site plan approval violates provisions of Chapters 125 and 163, Florida Statutes, the Pinellas County Charter, the Pinellas County Land Development Code, and Plaintiffs' procedural due process rights under the Florida Constitution.

In response to the Innisbrook Third Amended Complaint, Defendants have asserted lack of certiorari jurisdiction over Counts III-IV as to Intervening Plaintiffs[1] and over Counts VIII-XV as to all Plaintiffs. (See Fifth and Twelfth Affirmative Defenses.) In response to the Luckey Second Amended Complaint, Defendants have asserted lack of certiorari jurisdiction over Counts I-VIII. (See First Affirmative Defense.)

Defendants contend that the Court lacks jurisdiction over the above-referenced claims because they were not timely filed. Their position is that these issues could only be raised by the filing of a petition for writ of certiorari within 30 days after the County's approval of the final site plan. Thus, because Plaintiffs' above-referenced claims were filed more than 30 days after the approval of the final site plan, Defendants contend that the Court lacks certiorari jurisdiction to consider these claims.

The Court has considered the relevant pleadings, motions, memoranda of law, and other matters of record, pertinent case and statutory law, and the arguments of counsel, and the Court is fully informed as to the parties' respective positions regarding the Court's certiorari jurisdiction.

Accordingly, the Court makes the following findings and conclusions:

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[1] In this Order the term "Intervening Plaintiffs" refers to Plaintiffs Joseph E. Colwell and Marcia G. Colwell, Kirk E. Covert and Deborah A. Covert, James M. Luckey and Mary H. Luckey, and Andrew J. McAdams and Aphrodite B. McAdams

1. It is undisputed that the County approved the final site plan for Innisbrook Parcel F on December 22, 2004.

2. It is undisputed that Counts III-V (as to Intervening Plaintiffs) and VIII-XV (as to all Plaintiffs) of the Innisbrook Complaint (Case No. 04-3388 CI-15) were not filed until July 12, 2005, more than six months after the County's approval of the subject final site plan.

3. It is undisputed that the Initial Complaint in the Luckey case (Case No. 05-2534 CI-20) and the Luckey First Amended Complaint containing Counts I-VIII were not filed until April 8 and July 18, 2005, respectively, more than 90 days after the County's approval of the final site plan for Innisbrook Parcel F.

4. It is well established that a local government's decision on a final site plan is a quasi-judicial action. *Park Commerce Assoc. v. City of DelRay Beach*, 636 So.2d 12, 15 (Fla. 1994); *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389, 395 (Fla. 4th DCA 2003) ("[I]t is well settled that traditional site plan review is a quasi-judicial act."). Such actions are quasi-judicial because they involve the application of a local government's land development regulations, which are legislative standards of general applicability, to a specific application for site plan approval. *See Board of County Commissioners v. Snyder*, 627 So.2d 469, 474, (Fla. 1993); *Kahana v. City of Tampa*, 683 So.2d 618 (Fla. 2d DCA 1996). Although Plaintiffs contend that the due process aspects of the County's decision determines whether it is quasi-judicial action, and that the county's approval of the final site plan for Innisbrook Parcel F was not quasi-judicial because it was made without giving Plaintiffs notice and a hearing,

the Court disagrees with this contention which was rejected in *Board of County Commissioners of Sarasota County v. Karp*, 662 So.2d 718, 720 (Fla. 2d DCA 1995). *See also Section 28 Partnership Ltd. v. Martin County*, 642 So.2d 609, 612 (Fla. 4th DCA 1994). Accordingly, the Court concludes that Pinellas County's approval of the final site plan was quasi-judicial action.

5. Except in actions alleging inconsistency with a local comprehensive plan pursuant to Section 163.3215, Florida Statutes, the quasi-judicial actions of local governments are judicially reviewable only by writ of certiorari. *Park of Commerce Assoc. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994). A petition for writ of certiorari must be filed within 30 days of the rendition of the quasi-judicial action. Fla. I. App. P. 9.100(c)(2). This 30-day time limit is jurisdictional.

6. Plaintiffs' claims that the County's approval of the final site plan for Innisbrook Parcel violated Chapters 125 and 163 (with one exception)[2] the Pinellas County Charter, Pinellas County Land Development Code, and Plaintiffs' procedural due process rights under the Florida Constitution should have been made in a petition for writ of certiorari filed within 30 days after rendition of the final site plan approval. Certiorari review would consider whether the County, in approving the final site plan, observed the essential requirements of law and afforded Plaintiffs procedural due process. *Manatee County v. City of Bradenton*, 828 So.2d 1083 (Fla. 2d DCA 2002).

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[2] The exception is the claim, pursuant to Section 163.3215, Florida Statutes, that the final site plan approval is inconsistent with the Pinellas County Comprehensive Plan

7. Counts VII-XV of the Innisbrook Third Amended Complaint (Case No. 04-3388 CI-15) were not filed until July 12, 2005, more than six months after the County's approval of the final site plan on December 22, 2004. These Counts present claims that are distinctly different from the claims raised in the previously filed Counts I-VII. These new claims include allegations that the final site plan approval violates provisions of Chapters 125 and 163, Florida Statutes, the Pinellas County Charter, the Pinellas County land Development Code, and Plaintiffs' procedural due process rights under the Florida Constitution. The original Innisbrook Plaintiffs, who timely filed Counts I and II of the Innisbrook Complaint within 30 days after approval of the final site plan for Parcel F, contend that the new above-referenced claims in Counts VIII-XV should relate back to the filing of their original complaint. According to these Plaintiffs, under the doctrine of relation back, their claims should be deemed timely filed and therefore within the Court's certiorari jurisdiction. However, the "relation back" doctrine applies to the statute of limitations which is procedural in nature. It does not apply to or alter the 30-day jurisdictional time requirement for filing a petition for certiorari. Therefore, as to all Plaintiffs in Counts VIII-IV of the Innisbrook Third Amended Complaint (Case No. 04-3388 CI-15), the above-referenced new claims were untimely filed more than 30-days after the County's approval of the final site plan approval for Parcel F.

8. Therefore, to the extent that Counts III-V (as to Intervening Plaintiffs only) and Counts VIII-XV of the Innisbrook Third Amended Complaint (Case No. 04-3388 CI-15) and Counts I-VIII of the Luckey Second Amended Complaint (Case No. 05-25340 CI-15) present claims

alleging that the final site plan approval for Parcel F violates Chapter 125 and 163 (with the Section 163.3215 exception noted above), Florida Statutes, the Pinellas County Charter, the Pinellas County Land Development Code, and the Plaintiffs' procedural due process rights under the Florida Constitution, the Court lacks certiorari jurisdiction of those claims. Those claims were not filed within 30-days of the County's final site plan approval of parcel F.

9. This Order does not determine or rule on Plaintiffs' procedural due process claim pursuant to 42 U.S.C. §§ 1983 and 1988, or the claims that Pinellas County Mandatory Rule on Transferable Development Rights Associated with FLUM Open Space Designations, Table 4, Part II, and Density Averaging, Table 4, Part III, of the Future Land Use Element of the County Comprehensive Plan and Section 138-645, Pinellas Land Development Code, constitute unconstitutional delegations of legislative authority to administrative officials. This Order also does not affect or determine the claims of inconsistency with the Pinellas County Comprehensive Plan not previously dismissed by the Court.

Accordingly, it is

ADJUDGED AND ORDERED that Defendants' Motion are granted as follows:

1. The Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and the two Motions for Summary Judgment are partially granted.

2. To the extent that they claim violations of Chapters 125 and 163 (with the exception of still pending Section 163.3215 claims), the Pinellas County Charter, the

Pinellas County Land Development Code, and Plaintiffs' procedural due process rights under the Florida Constitution, Counts III-V (as to Intervening Plaintiffs only) and Counts VIII-XV in Case No. 01-3388 CI-15 and Counts I-VIII in Case No. 05-2534 CI-20) are dismissed with prejudice for lack of certiorari jurisdiction. This Order shall constitute a final order on these claims.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, on this 15 day of December 2005.

/s/ Brandt C. Downey, III
Brandt C. Downey, III
Circuit Judge

Certified Copies To:

Stephen O. Cole, Esq.
David Smother, Esq.
David Sadowsky, Esq.
Robert V. Williams, Esq.
Thomas G. Polliam, Esq.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

June 14, 2007

CASE NO.: 2D06-1477
L.T. No.: 04003388CI

Innisbrook Condominium Association, Inc., Et Al.	v.	Pinellas County, Golf Host resorts, Inc., Et Al.
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellants' motion for rehearing and/or certification is denied.

Appellants' motion for written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Susan W. Fox, Esq.
William L. Hyde, Esq.
Robert V. Williams, Esq.
Pamela Jo Hatley, Esq.
Thomas G. Pelham, Esq.
Ken Burke, Clerk
Wendy S. Lo Quasto, Esq.
David S. Sadowsky, Esq.

me

/s/ James Birkhold [SEAL]
James Birkhold
Clerk

Florida Statutes § 163.3161(1) (2004)

(1) This part shall be known and may be cited as the "Local Government Comprehensive Planning and Land Development Regulation Act."

* * *

(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.

(6) It is the intent of this act that the activities of units of local government in the preparation and adoption of comprehensive plans, or elements or portions therefor, shall be conducted in conformity with the provisions of this act.

(7) The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.

* * *

(9) It is the intent of the Legislature that all governmental entities in this state recognize and respect judicially acknowledged or constitutionally protected private property rights. It is the intent of the Legislature that all rules, ordinances, regulations, and programs adopted under the authority of this act must be developed,

promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property. Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking, as provided by law. Any such relief must be determined in a judicial action.

Florida Statutes § 163.3164 (2004)

* * *

(7) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.

Florida Statutes § 163.3167(2) (2004)

* * *

(2) Each local government shall prepare a comprehensive plan of the type and in the manner set out in this act or shall prepare amendments to its existing comprehensive plan to conform it to the requirements of this part in the manner set out in this part. . . .

Florida Statutes § 163.3194(1) (2004)

(1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies

in regard to land covered by such plan or element shall be consistent with such plan or element as adopted.

* * *

(b) All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof, and any land development regulations existing at the time of adoption which are not consistent with the adopted comprehensive plan, or element or portion thereof, shall be amended so as to be consistent. . . .

Florida Statutes § 163.3177(6)(a) (2004)

[T]he comprehensive plan shall include the following elements:

> (a) A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. . . . The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives.
>
> * * *

Florida Statutes § 163.3184 (2004)

(1) Definitions. – As used in this section, the term:

(a) "Affected person" includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; owners of real property abutting real property that is the subject of a proposed change to a future land use map; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

* * *

(7) Local government review of comments; adoption of plan or amendments and transmittal. –

(a) . . . The adoption of the proposed plan or plan amendment or the determination not to adopt a plan amendment, other than a plan amendment proposed pursuant to s. 163.3191, shall be made in the course of a public hearing pursuant to subsection (15). . . .

* * *

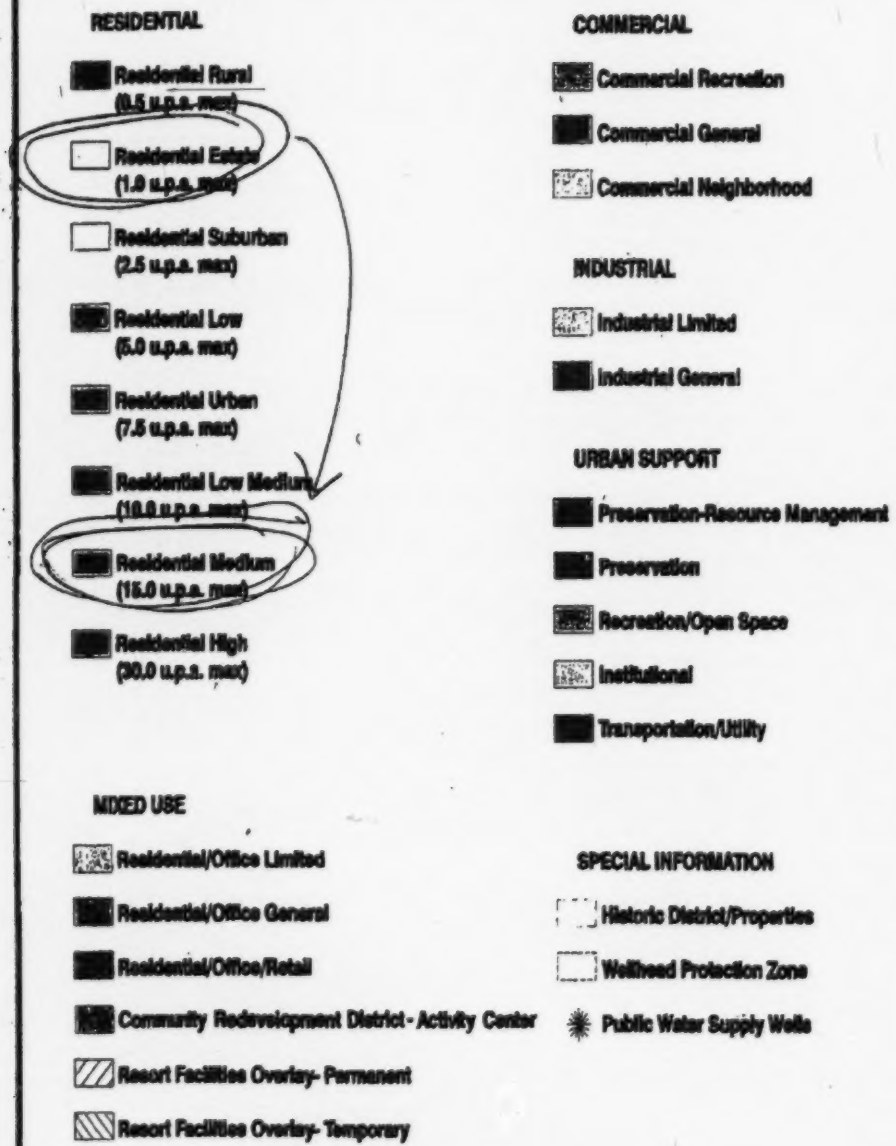
(15) Public hearings. –

(a) The procedure for transmittal of a complete proposed comprehensive plan or plan amendment pursuant to subsection (3) and for adoption of a comprehensive plan or plan amendment pursuant to subsection (7) shall be by affirmative vote of not less than a majority of the members of the governing body present at the hearing. The adoption of a comprehensive plan or plan amendment shall be by ordinance. For the purposes of transmitting or adopting a comprehensive plan or plan amendment, the notice requirements in chapters 125 and 166 are superseded by this subsection, except as provided in this part.

(b) The local governing body shall hold at least two advertised public hearings on the proposed comprehensive plan or plan amendment . . .

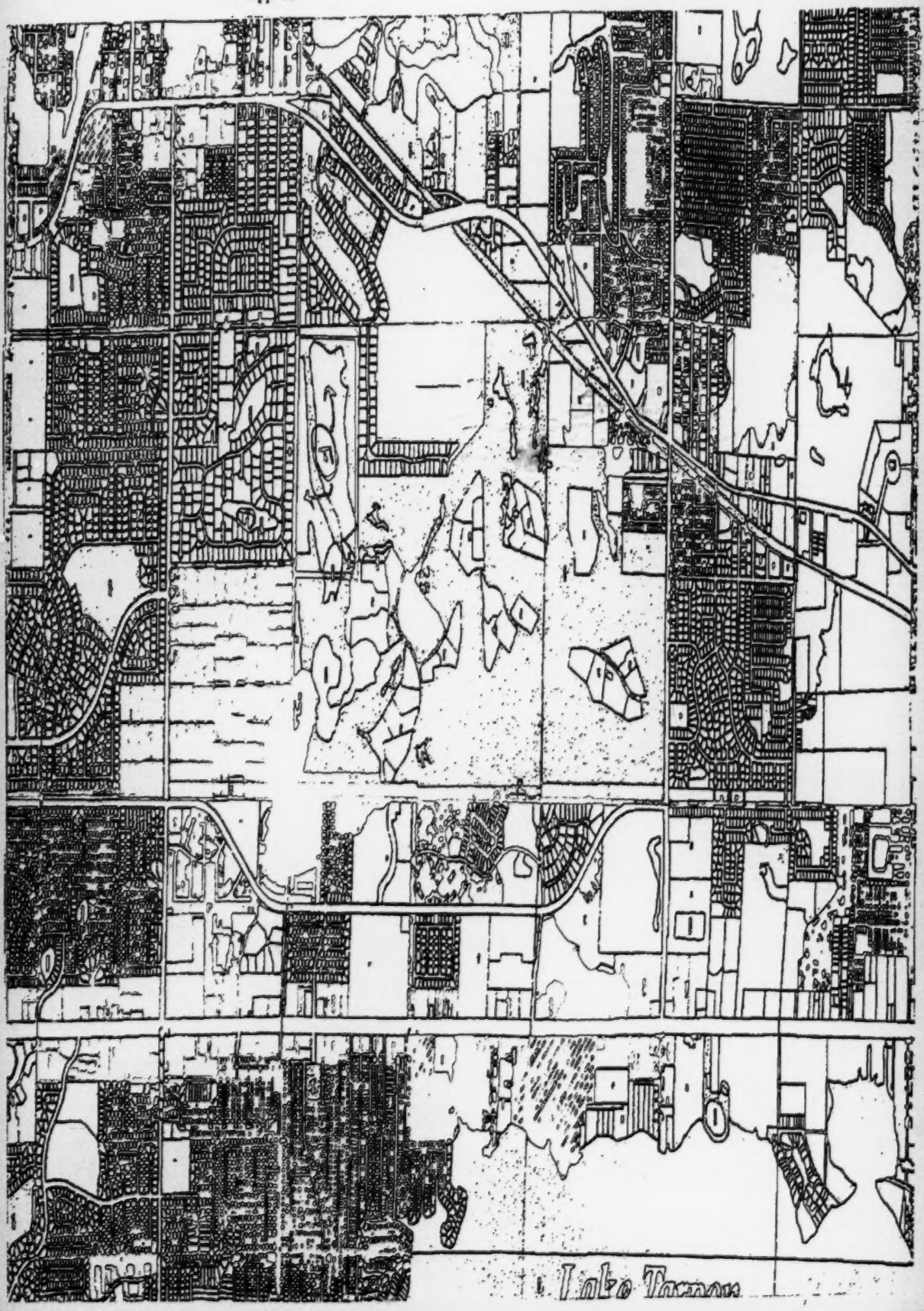
* * *

FUTURE LAND USE MAP OF THE PINELLAS COUNTY COMPREHENSIVE PLAN



December 16, 2003

BEST AVAILABLE COPY



TO:	*Stephen M. Spratt, County Administrator*
THROUGH:	*Paul T. Cassel, Administrator DRS Department*
FROM:	*Al Navaroli, Development Review Services Manager A.L.N.*
SUBJECT:	*Westin Innisbrook Parcel F SP# 1050.07 Revised Final Site Plan Parcel ID #: 25-27-15-00000-100-0100 Plan Distribution Date: 8-25-04*
DATE:	*December 22, 2004*
RECOMMENDATION:	*Recommend Approval*
LEGAL DESCRIPTION:	*A tract of land lying within the Westin Innisbrook Development in Section 24, Township 27S, Range 15 E*

The above referenced site plan has been processed through the Pinellas County site plan review system to include the following departments: Utilities Department, Planning Department, Development Review Services Department, and has been found to be in compliance with Pinellas County regulations.

Description: This site consists of 39 acres located on the north side of Bee Pond Road, east of US Alt.19 within the Westin Innisbrook Development. This plan proposes 19 single-family lots (zero-lot line) and 381 multi-family unites lying within 37 buildings. A total of 400 unites are designated for the Parcel F development under the Innisbrook Master Plan. Those problems cited by the

Development Review Services Department have been resolved and final site plan approval is recommended. However, the Certificate of Occupancy cannot be issued until the Environmental and Engineering conditions have been satisfied. This site is zoned RPD-5 and identified by the Comprehensive Land use Plan as RE.

The applicant received preliminary/direct final site plan review for this project on 5-2-01 and now submits this plan for final site approval. Due to Commission action of January 26, 1974, all final site plans will be approved administratively by the Pinellas County Administrator.

FINAL SITE PLAN

Approved Dec. 22, 2004

by /s/ Stephen M. Spratt

Stephen M. Spratt
County Administrator

AN/jm
King Engineering
4921 Memorial Highway
One Memorial Center, Ste 300
Tampa, FL 33634
813-380-3881